

**IOWA DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:

DAVID KUNDEL, L.L.C.
Facility #58510

Muscatine County, Iowa

ADMINISTRATIVE CONSENT
ORDER

NO. 2011-AFO-09

TO: David Kundel, Owner
David Kundel, L.L.C.
2238 Estle Avenue
Letts, Iowa 52754

Steven Kundel, Registered Agent
David Kundel, L.L.C.
300 E 2nd Street, Suite 300
Muscatine, Iowa 52761

I. SUMMARY

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and David Kundel, L.L.C. for the purpose of resolving a construction permit violation at the David Kundel, L.L.C. animal feeding operation located in Muscatine County, Iowa. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

Relating to technical requirements: **Relating to legal requirements:**

Josh Sobaski, Field Office 6
Iowa Department of Natural Resources
1023 W. Madison
Washington, Iowa 52353-1623
Phone: 319/653-2135

Kelli Book, Attorney for the DNR
Iowa Department of Natural Resources
7900 Hickman Road, Suite 1
Windsor Heights, Iowa 50324
Phone: 515/281-8563

Payment of penalty to:

Iowa Department of Natural Resources
Henry A. Wallace Building
502 East Ninth Street
Des Moines, Iowa 50319-0034

II. JURISDICTION

This administrative consent order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code chapter 455B, Division III, Part 1 and Iowa Code chapter 459 and the rules adopted or permits issued pursuant

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thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) chapter 10, which authorize the Director to assess administrative penalties.

III. STATEMENT OF FACTS

1. David Kundel, L.L.C. owns and operates an animal feeding operation located in Section 30 of Muscatine County, Iowa. The animal feeding operation is a 3,750 grow to finish swine operation (1,500 animal units).

2. In August 2010, David Kundel, L.L.C. applied for a construction permit from the DNR for the construction of a formed manure storage structure at the facility. As part of the DNR's construction permit review, the field office conducts a site survey.

3. In September 2010, Josh Sobaski, DNR Field Office 6 environmental specialist, conducted the site survey at the David Kundel, L.L.C. facility. Mr. Sobaski noted that construction of the proposed formed manure storage structure had begun. The concrete floor had been poured. Mr. Kundel alleged that his contractor performed this work despite Mr. Kundel's instructions that no concrete could be poured until such time as a construction permit from DNR was obtained. Mr. Kundel informed Mr. Sobaski that 211 yards of concrete was poured at a cost of \$18,182.96 on June 11, 2010. Mr. Kundel stated that the floor was poured with thick rebar and that it exceeded the architect specifications by using 4,000 psi concrete for the footers rather than the required 3,500 psi concrete. Mr. Kundel stated as of September 10, 2010, David Kundel, L.L.C. had spent approximately \$47,000.00 on the construction project.

4. On September 14, 2010, DNR Field Office 6 issued a Notice of Violation letter to David Kundel, L.L.C. for failing to obtain a construction permit prior to initiating construction on a formed manure storage structure. The letter informed the facility that the matter was being referred for further enforcement. The certified letter went unclaimed and was mailed again through regular mail on October 15, 2010.

5. In late September 2010, DNR Field Office 6 forwarded the photographs taken during the inspection to DNR construction permit engineer, Paul Pettiti, for review. Mr. Pettiti responded with concerns on the thickness of the floor and the footings under the wall. He also had questions regarding the rebar and if there had been an engineer on site when the concrete was poured.

6. On October 20, 2010, DNR Field Office 6 sent David Kundel, L.L.C. a letter regarding the construction permit application for the formed manure storage structure. Based on Mr. Pettiti's concerns, the letter informed the facility that there were several pieces of information that must be submitted prior to the construction

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permit being issued. The concerns were addressed and the construction permit has been issued.

IV. CONCLUSIONS OF LAW

1. Iowa Code section 459.103 provides that the Environmental Protection Commission (Commission) shall adopt rules related to the construction or operation of animal feeding operations. The Commission has adopted such rules at 567 IAC chapter 65.

2. Iowa Code section 459.303(1)(a)(1) and 567 IAC 65.7(1)(b)(2) require that a confinement feeding operation obtains a construction permit prior to constructing, installing or modifying a confinement building or a formed manure storage structure at a confinement feeding operation. David Kundel, L.L.C. applied for a construction permit application for the construction of the formed manure storage structure, but failed to obtain the construction permit prior to beginning construction on the structure. The above-facts indicate a violation of this provision.

V. ORDER

THEREFORE, it is hereby ordered and David Kundel, L.L.C. agrees to do the following:

1. Pay a penalty of \$3,500.00 within 30 days of the date the Director signs this administrative consent order.

VI. PENALTY

1. Iowa Code sections 455B.191 and 459.603 authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Commission to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty. The administrative penalty assessed by this administrative consent order is \$3,500.00. The administrative penalty is determined in accordance with the following:

Economic Benefit – David Kundel, L.L.C. gained an economic benefit by not having an engineer on site during the time the concrete was poured. This avoided

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cost created an economic benefit. It is estimated the avoided cost is at least \$500.00 and that amount is assessed for this factor.

Gravity of the Violation – One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Because David Kundel, L.L.C. did not have an engineer present during the concrete pour, the DNR has no way of ensuring the concrete was poured properly. Failure to comply with the construction permit conditions threatens the integrity of the animal feeding operations permitting program. Based on the above considerations, \$2,000.00 is assessed for this factor.


Culpability – David Kundel, L.L.C. has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that its conduct is subject to Iowa law. David Kundel, L.L.C. is the owner of the facility and is responsible for the actions of its contractor. Based on the above considerations, \$1,000.00 is assessed for this factor.

VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of David Kundel, L.L.C. For that reason, David Kundel, L.L.C. waives the right to appeal this administrative consent order or any part thereof.

VIII. NONCOMPLIANCE

Compliance with Section V of this administrative consent order constitutes full satisfaction of all requirements pertaining to the violations described in the administrative consent order. Failure to comply with this administrative consent order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191.



ROGER L. LANDE, DIRECTOR
Iowa Department of Natural Resources

Dated this 19th day of
April, 2011.



DAVID KUNDEL, L.L.C.

Dated this 11 day of
April 2011.

#58510; Kelli Book; Field Office 6; Ken Hessenius; Gene Tinker; EPA; VIII A 2